No. 75-1679

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

PENA NENOFF, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF NENO S. NENOFF, DECEASED,

Petitioner,

v.

GEORGE M. THOMPSON,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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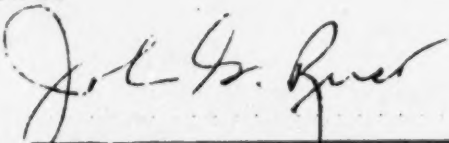
APPENDIX: AND CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

2 Copies of this Reply Brief have been served forthwith upon Respondent's Attorney Mr. James R. Jeffery, 934 National Bank Building, Toledo, Ohio, 43604.



John G. Rust
Attorney for Petitioners

CITATIONS

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT.

In view of the scope, seriousness, and number of Respondent's misleading statements and arguments of the Record, and also to Answer certain Arguments first raised by Respondent, Petitioners

file their Reply brief herein. Petitioners naturally and understandably are interested in their cause being determined upon an accurate understanding of the Record, and we believe that this Brief will be of help to this Court in carrying out also its desire to proceed without misunderstanding.

Respondent's actions upon analysis are indeed paradoxical. Respondent successfully induced the Trial Court to grant his Motion to Limit Plaintiffs to recovery only if Wanton and Wilful misconduct were proved because of the Ohio Guest Act; and also Respondent successfully moved the Trial Court for a Separation of Witnesses so as to exclude surviving spouse Pauline Nenoff and children except when testifying. The Trial Court so ordered.

Now the Respondent, contrary to the Record, claims that because the Trial Court did just what Respondent asked the Trial Court to do, that Petitioners "induced" such errors, and, therefore, can't attack the constitution-

ality of such actions.

At the time of the trial when the Trial Court granted Respondent's Motions, the parties were governed by Ohio Revised Code 2321.03 which provided as follows:

> "2321.02 Exception not necessary (GC 11560) An exception is not necessary, at any stage or step of the case or matter, to lay a foundation for review whenever a matter has been called to the attention of the Court by objection, motion, or otherwise and the court has ruled thereon. Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge. Laws of Ohio, Vol. 116 at page 115."

Respondent's contentions seem to admit that the record shows that the Trial Court did grant Respondent's motions, but Respondent seems to argue that somehow Petitioners "induced" the Trial Court to grant Respondent's motions, and somehow "waived" the constitutional errors. Such simply neither is or was the case, and the Record clearly shows the errors are preserved.

STATEMENT OF THE CASE

B. ON RESPONDENT'S MOTION, AND OVER PETITIONER"S

OBJECTIONS, THE TRIAL COURT RULED PETITIONERS COULD NOT RECOVER BY MERELY PROVING NEGLIGENCE, BUT TO RECOVER, PETITIONERS WERE RULED BY THE TRIAL COURT TO HAVE TO PROVE WANTON MISCONDUCT.

CLEARLY THE RECORD SHOWS PETITIONERS DID NOT AT ANY TIME "INDUCE" THE TRIAL COURT TO RULE PETITIONERS COULD ONLY RECOVER BY PROVING WANTON MISCONDUCT.

The record shows the argument on Respondent's motion for a direct verdict that there could be no recovery for mere negligence, due to the Ohio Guest Statute, was hotly contested by Petitioners. The Record, as shown on page 10 of Petitioner's Petition filed herein, and also in the Record in part as follows at page 394 of the Transcript of the Evidence shows this:

> "THE COURT: The law is clear that before you can show that a man is a passenger for hire, to take him out of the wilfull and wanton, you've got to show a prior agreement to travel for hire, which makes a driver a common carrier and removes the wilfull and wanton. Now there is no evidence of a prior agreement between George Thompson and the decedent, or that he was in the car for the sole benefit of Mr. Thompson.
>
> Therefore, as a matter of law I am going

to rule this is strictly a guest case and the standard has to be wilfull and wanton.

MR. BARTLETT: We object. I had not finished giving the rest of the argument, Your Honor.

THE COURT: Go ahead and put it on the record, but from your own statement at that point there is no question. As a matter of law, he is a guest."
(underscoring ours)

PETITIONER DID NOT REQUEST ANY SPECIAL INSTRUCTIONS IN THE WRONGFUL DEATH WHICH SAID IF THE JURY FOUND WANTON MISCONDUCT, PETITIONERS COULD RECOVER. PETITIONERS INSTRUCTIONS AS TO WANTON MISCONDUCT WERE DEFINITIONS.

The Trial Court's comments, Transcript page 559, and the Special Instructions, Transcript Page 563-1 et seq. are given in the Appendix herein at pages 1-9. Petitioner had requested Special Instructions 1 through 8. Respondent, requested Special Instruction 9, which was given, over Petitioner's objection.

Here, the status and posture of Petitioner's burdens and requests were that, yes, due to then Ohio Guest Act and the Trial Court's granting Respondent's motion for a directed

verdict on the issue of negligence, Petitioners could not recover, except by proving wanton or wilful. Since the Ohio Guest Act has been declared by the Ohio Supreme Court to be invalid by the Ohio and United States Constitutions, Petitioners were subjected to an unconstitutional barrier to recovery, and were prejudiced thereby. Petitioners did not attack the unconstitutionality of the Ohio Guest Act, because it would have been futile then to have done so, but did attack it in the Lucas County Court of Appeals, once an appeal was taken there, which was after grounds for so doing appeared on the judicial horizon.

Petitioner had no alternative but to face the Ohio Guest Act, and merely sought by requesting Special Instructions, and by Petitioner's request after the General Instructions to the jury, to cause wanton misconduct to be defined according to law, for all proper purposes for which it was to be used.

Petitioner did request Special Instruction 2 A, Transcript Page 563-2, and Page 3 of

Appendix herein, and Petitioners did request Special Instruction 2 B, Transcript Page 563-3, Appendix herein Page 4 , but neither of these were anything more than definitions of wanton misconduct. Petitioner did not ask the Trial Court to allow recovery only if wanton misconduct were proved, but Respondent "induced" the Trial Court so to rule.

First of all, this Court should declare all the rules which govern denials of Constitutional rights. What constitutes waiver or loss of a right to claim a right by the U.S. Constitution is, and should be, determined by this Court.

Here, it's believed helpful to this Court to discuss Carrothers vs. Hunter, (1970) 23 Ohio St. 2d 99, which will show that all errors and points relied upon by Petitioners here in this Petition for Certiorari, were preserved under Ohio Law. In Carrothers v. Hunter, supra, the plaintiff's lawyer relied

on the Court's statement of what the law was, and did not object to an instruction. But, when it was later found in the Court of Appeals that the instruction was contrary to law, he was allowed to assert it as error, although in effect he had agreed to it below - because he had not "induced" the error.

The syllabus by the Court is as follows:

> "1. The word induce is commonly understood to mean to lead on, prevail upon or to move a party by persuasion or influence, and generally connotes the use of persuasion or influence by a party upon another to effect a result."
>
> 2. Where there are errors of commission in the charge of a court to the jury, not induced by the complainting party, a failure to object thereto does not constitute a waiver of the error, and such error may be proper grounds for an appeal. (Simko v. Miller, 133 OhioSt. 345, 10 O.O. 535, paragraph three of the syllabus; Rosenberry v. Chumney, 171 Ohio st. 48, 12 O.O. (2d) 56; and State v. Lynn, 5 OhioSt. (2d) 106, 34 O.O. (2d) 226, paragraph four of the syllabus; followed."

That mere acquiescence or agreement with the Trial Court does not prevent one from asserting a point as error is shown by the Court's opinion, which in 23 OhioSt. 2d at

page 101 reads as follows:

"HEREBERT, J. The record in this case clearly shows that the giving of the charge by the trial judge, in response to the question asked by the jury, was based upon the judge's and counsels' belief that the law contained in the charge was correct. Kohn v. B.F. Goodrich Co. (1941), 139 OhioSt. 141, 22 O.O. 127, 38 N.E.(2d) 592. It is undisputed that counsel for the appellee had no knowledge of the error and that he relied upon the stated conclusion of the trial judge that the Kohn case was the applicable law. Under these circumstances, appellee's counsel informed the judge:

"I have no objection to the charge being given.:"

"Both parties now know and agree that the instruction to the jury was erroneous The Kohn case was overruled by this court in Oechsle v. Hart (1967), 12 Ohio St. (2d) 306. Thus, the narrow question presented here is whether appellee, under the facts presented, induced the court to give the charge, and, therefore, lost her right to have the charge reviewed on appeal.

"Section 2321.03, Revised Code, provides:"

"An exception is not necessary, at any stage or step of the case or matter, to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge."

In reversing the decision of the trial court, the Court (102) of Appeals found the charge to the jury to be erroneous and found further that the record does not reveal any inducement of the court by the appellee.

It is generally stated that errors which arise during the course of the trial of a cause, which are not brought to the attention of the court by objection or other wise, are waived and may not be raised on appeal. See, for example, Rosenberry v. Chumney (1960), 171 OhioSt. 48, 50, 12 O.O. (2d) 56, 57, 168 N.E. (2d) 285. One of the exceptions to this general rule concerns errors which occur in the charge to a jury. Where the trial court gives an instruction which is incomplete, but correct as far as it goes, such error in the charge is an error of omission and it is complaining counsel's duty to request the trial court to charge further in order to eliminate any possible confusion of the jury which may result from such deficiency. Unless counsel has requested the court to supply the omissions, the error is not reviewable on appeal. Rhoades v. Cleveland (1952), 157 OhioSt. 107, 47 O.O. 91, 105 N.E. (2d) 2; State v. Tudor (1950), 154 OhioSt. 249, 43 O.O. 130, 95 N.E. (2d) 385. However, where the trial court gives an erroneous statement of law in a charge, not induced by the complaining party, such an error is an error OF COmmission and it may be reviewed on appeal without the party's having objected to the charge. Section 2321.03, Revised Code; Rosenberry v. Chumney, supra; Simko v. Miller (1938), 133 Ohio St. 345, 10 O.O. 535, 13 N.E. (2d) 914; State v. Lynn (1966), 5 OhioSt. (2d) 106, 34 O.O. (2d) 226, 214 N.E. (2d) 226.

"It is appellant's contention that when the appellee stated to the trial court that she had no objection to the proposed charge, such action constituted an inducement under Section 2321.03, Revised Code, and that the error cannot be reviewed on appeal.

"The word induce is commonly understood to mean to lead on, prevail upon or to move a party by persuasion or influence. Oxford English Dictionary (1961Edition); Webster's Third New International Dictionary. The word induce connotes the use of persuasion or influence by a party on another to effect a result.

"(103) In the case at bar, nothing in the record indicates that the appellee's counsel in any manner persuaded or influenced the trial judge to give the erroneous charge to the jury. Under the instant circumstances, appellee's innocent acquiescence in the trial judge's erroneous conclusion that the applicable law was stated in the Kohn case does not establish that the charge was in any manner induced by the appellee.

"Appellant also argues that the Court of Appeals abused its discretion in hearing this assignment of error because the appellee failed to raise the propriety of the charge either in her motion for new trial or in the original and reply briefs filed in the Court of Appeals. While the record discloses that the assignment of error was first raised in oral argument before the Court of Appeals, the court deferred its decision until the appellant had an opportunity to file a supplemental memorandum in answer to the assigned error.

"Appellant's memorandum was filed on May 23, 1969, and appellee filed a reply on May 28, 1969. Appellant had ample opportunity to present his position to the Court of Appeals and under the facts of this case we do not feel that the court abused its discretion in considering the assignment of error.

For the reasons stated, the judgment of the Court of Appeals is affirmed and the cause is remanded to the Court of Common Pleas for further proceedings."
(underscoring ours)

The Trial Court did instruct the jury that the jury could only find for the plaintiff if the jury found wanton or wilful misconduct, and stated the jury must return a verdict for Defendant Thompson if only mere negligence was proved. The Court's instructions at Page 576 of the Transcript read:

"I must now define to you willful misconduct and wanton misconduct, but before I do that I must read you the Statute that applies to this case. This is Section 4515.02 of the Revised Code. It says:

"'The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death

of a guest, resulting from the operation of said motor vehicle, which such guest is being transported without payment therefore in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operation.'"

Also at Page 580 of the Transcript the Court instructed:

"Now, the Court will instruct you that as a matter of law under the evidence produced, the plaintiff decedent Neno S. Nenoff, was a guest in the car and, therefore, this willful or wanton standard must apply."

At Page 2 of Respondent's Brief, his Counsel states:

"Thereafter, following arguments by both sides, the court instructed the jury generally on the issues of willful or wanton misconduct and assumption of risk, to which no objection was made by petitioner or any suggestion by petitioner or request that the Court charge on the issue of negligence instead of willful or wanton misconduct."

First of all, the Trial Court had instructed on the definition of negligence, beginning at page 573 as follows:

"Now, Counsel and the Court have used the word negligence. This is not a

> negligence action, but in order to define the rules that apply to this case, it's necessary that the Court define negligence for you.
>
> "In viewing negligence in the light of the alleged willful or wanton misconduct, the Court instructs you that willful or wanton misconduct is something more than negligence. To amount to willful or wanton misconduct the conduct of the driver must be more flagrant than negligence, must go beyond negligence.
>
> "Negligence is defined as the failure to exercise ordinary care, that degree of care which a reasonably prudent person would use or exercise under the same or similar circumstances. Negligence is synonymous with heedlessness, carelessness, thoughtlessness, inattention, inadvertence and oversight. Negligence implies a failure to comply with an indefinite rule of conduct under the circumstances of any particular case."

Again, once the Trial Court rules, or affirmatively instructs on a point, such instruction, if erroneous, is an "error of commission", and there is nothing a party must or can do. Here, the Trial Court was emphatic that Respondent was correct in his Motion that the Ohio Guest Statute controlled. Plaintiff's Counsel for over 6 pages of the Transcript, Pages 391-b to 396, had contended Plaintiff had proved a prima facie case that decedent was a passenger, and not under the Guest Statute, but the Court ruled in favor

of Respondent and against the Plaintiff. So there was nothing thereafter that needed to be done to preserve the point for appeal - the error was an "error of commission", just as in the Carrothers v. Hunter case supra where the wrong rule of law was instructed, but error could be asserted. In 1970 the Ohio Guest Statute was thought by all to be constitutional; later in 1974, Petitioner had hope, though dim, of attacking it, and this was done on appeal. The law and argument demonstrating that Petitioners did not waive their right to attack the constitutionality of the Guest Statute was made in Petitioners' Brief at Page 27 on the propriety of Primes v. Tyler being applied to all pending cases, and at Page 33 that there had been no waiver because there was no known relinquishment of a known right. Rosenblatt v. Baer, 383 U.S. 75; Curtis Publishing Co. v. Butts, 388 U.S. 130; and at Page 37 of Petitioner's Brief is discussed O'Connor v. Ohio, 385 U.S. 92, which specifically held the Federal rule of applying Constitutional determinations of rights to pending cases, despite any Ohio Supreme

Court rules to the contrary. In Rosenblatt and O'Connor the attack on the constitutionality was first brough after the cases were being appealed.

That Ohio law frowns on exceptions or objections after the Court affirmatively rules, was pointedly brought out in this Trial, when the defendant was called to secure from him testimony opposing what defendant's own witnesses had said, but the Trial Court refused, the Transcript reading as follows at Page 538-6:

> "Mr. Rust: Your Honor, I will call the defendant to the witness stand on rebuttal, please, Defendant George Thompson.
>
> Mr. Jeffery: Object to procedure. He already testified.
>
> The Court: Objection will be sustained for the reason the Plaintiff called the Defendant as on cross-examination as part of their case in chief, and he did not testify in his own case and defense case.
>
> It is improper testimony.
>
> Mr. Rust: Let the Record show an exception.
>
> The Court: Mr. Rust, you know the law of Ohio does not require taking exception. Let's not fill up the record with unnecessary statements.

Mr. Rust: I accept your ruling, and I am abiding by it. I want the record to show that my view of the law differs, from my study."

Counsel intended to communicate to the Court that Counsel believed that under the law Defendent Thompson, who had not testified as part of his defense, could be called under Cross-Examination for those limited points as a part of Plaintiff's rebuttal in opposing the new points first brought up by Defendant in his defense.

Relevant here also is Ohio Revised Code 2321.02, which reads as follows:

"2321.02 EXCEPTION DEFINED. (GC 11559)

An exception is an objection taken to a decision of the trial court upon a matter of law."

Respondent cited 3 O. Jur. 2d Appellate Review, Section 185, which actually is not relevant here because all of the errors which Petitioner now asserts were errors of "commission," from affirmative and specific rulings by the Trial Court- and therefore, no further objection, nor exception, was needed. Respondent can't complain because Respondent induced

the Court to commit the errors. Relevant is the following statement in 3 O. Jur. 2d, Appellate Review, Section 218, which at page 89 reads in part as follows:

> "Under the Ohio practice since 1936, exceptions to an erroneous statement in a charge not induced by the complaining party are specifically eliminated in all respects.[15] This code section has been implemented by the Ohio courts.[16] Furthermore, under the first sentence of RC 2321.03 (GC 11560);[17] exceptions are not necessary as a condition to the review of any error in the refusal of a trial court to give special instructions requested before argument.[18]"

Footnote 18 above refers to Patton v. First Nat. Bank, (1938, App.) 28 O. L. Abs. 273.

Before leaving the issue of error in the Instructions, Petitioner did, as to certain alleged errors of omission, object to the Trial Court, Transcript at page 594, and included in the Appendix herein at page 10. These objections were made because the Trial Court's definition of Wanton Misconduct was more strict than required by Ohio law, and in the Survivorship Action, C. P. no. 206839,

Wanton Misconduct was omitted as a ground for exemplary damages; and lastly, in the Wrongful Death Action, the Court did not give Petitioner the benefit of the Presumption that decedent had acted with ordinary care to protect and preserve his life.

Petitioners sought recovery for exemplary damages only in the Survivorship Action, C. P. 206839, and the Court so instructed at Transcript Page 583.

THE TWO ISSUE RULE DOES NOT APPLY.

SINCE THE TRIAL COURT INSTRUCTED THE JURY THAT THE GUEST STATUTE PREVENTED PLAINTIFFS' RECOVERY ON PROOF OF MERE NEGLIGENCE, AND THIS WAS ERRONEOUS BECAUSE THE GUEST STATUTE IS UNCONSTITUTIONAL, PLAINTIFFS WERE SUBJECTED TO ERROR ON THE PRIMARY ISSUE OF LIABILITY, AND THEREFORE, EVEN IF THE SECONDARY ISSUE OF ASSUMPTION OF RISK WAS ERROR FREE, THE VERDICT MUST BE REVERSED UNDER WELL ESTABLISHED OHIO LAW, THAT ERROR ON THE PRIMARY ISSUE INVALIDATES THE VERDICT.

Respondent has really added nothing new, nor contrary to Petitioners' controlling precedent beginning at Page 14 of Petitioner's Petition heretofore filed. Those cases and arguments are valid.

Respondent has not cited any law different from that cited by Petitioner, in cases actually involving the 2 issue Rule.

Here, there was error on the Primary issue, that there could be no recovery for negligence because of the Guest Statute, because it is and was unconstitutional. The two issue Rule does not apply.

AS TO THE AFFIRMATIVE DEFENSE OF ASSUMPTION OF RISK, UPON WHICH DEFENDANT HAS THE BURDEN OF PROOF, THE EVIDENCE MERELY ROSE TO THE LEVEL, IF THAT, OF A QUESTION OF FACT FOR THE JURY. THEREFORE, THE VERDICT WAS NOT CONTROLLED BY THAT ISSUE, A ASSUMPTION OF RISK IS A SECONDARY ISSUE.

Petitioner did request an instruction on that issue.

There was no evidence Plaintiffs' decedent was intoxicated. He had worked at his trade until near to 5:00 P.M. Some witnesses did say Respondent Thompson was clearly not under the influence when Plaintiffs' decedent and he started to drive. Respondent Thompson further denied any Traffic Violations or other wrongful driving up to the time of the accident. There was no evidence to charge Plaintiffs' decedent with knowledge or notice that Respondent would try to take the curve at an excessive speed. By the evidence, he had driven safely up to that point. On this issue, at most, a question of fact was presented for the jury. Wever v. Hicks, 11 Ohio St. 2d 230 (1967); Davis v. Hollowell, 326

Mich. 673, 15 A. L. R. 2d 1160.

THE SURVIVING SPOUSE AND MINOR CHILDREN OF THE DECEDENT IN A WRONGFUL DEATH ACTION HAVE A RIGHT AS "REAL PARTIES IN INTEREST" TO BE PRESENT DURING ALL THE TRIAL OF THEIR ACTION, AND DENIAL THEREOF IS CONTRARY TO THE FOURTEENTH AMENDMENT, AND PREJUDICIAL ERROR.

Respondent here has added nothing new which is relevant. Petitioners refer to their Petition, pages 17, and 44.

Mr. Jeffery, lead Trial Counsel for defendant Thompson, in his memorandum filed on June 26, 1970 in the Trial Court in responding in part to Plaintiffs' motion for a new trial, stated as follows:

> "(F) Mrs. Pauline Nenoff was not a party in this action and was excluded from the court pursuant to defendant's motion for seperation of witnesses. Although Mrs. Nenoff might be the widow of the decedent, she is not a party to the law suit. There was one plaintiff, Mrs. Pena Nenoff, the decedent's mother, and she sat in the courtroom during the entire proceeding."

Again, after the Court ruled, there was no need for objection or exception, under Ohio Revised Code 2321.03, above.

The surviving spouse as a Michigan resident was not eligible to be appointed as Executrix in Ohio. Petitioners were prejudiced by the Court's exclusion of the surviving spouse and children, because they knew much that could and would have been of help, and the jury's observation of their reactions throughout the trial was desired, and needed.

No one had more to lose than Mrs. Pauline Nenoff, but she wasn't allowed to participate through the trial, and truly was denied her "Day in Court".

Respondent in his Brief at page 11, states:

> "Neither Pauline Nenoff nor the children were competent to testify concerning the auto accident or circumstances leading to it, as they were in Flint, Michigan at the time, the accident occurring in Toledo."

That Mrs. Pauline Nenoff knew some details of her husband's condition and where Defendant and he were is shown by the transcript, at page 363-30, as follows:

"A On Tuesday. Neno was here; so me and my sister were doing some canning. Neno was supposed to call me at six o'clock, which he did.

"Q You received a telephone call from your husband at six o'clock?

"A I most certainly did, yes.

"Q Now then, Mrs. Nenoff, when you received that telephone call, do you know where it came from?

"MR. JEFFERY: Your Honor, I object to this. We have already gone through this in chambers. This witness cannot know where it came from. This is pure hearsay.

"THE COURT: I have to sustain that objection.

"The fact that the telephone call was made may remain.

"MR. JEFFERY: I would like to read into the record that in chambers we have already discussed this matter. It has been ruled that the contents of this whole conversation could not be admitted, but regardless, Mr. Bartlett has gone into it, and I object to this.

"MR. BARTLETT: I want to make a proffer of evidence. If Mrs. Nenoff were permitted to answer, she would respond that she did know where it came from; that her husband, Neno, stated that it came from the Yacht Club here in Toledo, and that she heard in the background music like a jukebox, glasses

and bottles and noise of glasses and bottles, and people laughing and talking."

Mrs. Pauline Nenoff would have been of help at the trial table, as she had talked with the defendant after the death, and naturally had acquired many details.

CONCLUSION

A man's life was taken because without any need or justification Respondent Thompson determined to take an obvious curve at an obviously wanton and highly dangerous speed, estimated by the Traffic Engineer Billings at a minimum of 62 mph, Transcript page 172, and as stated by Witness Mrs. Fredrick at Transcript page 141, as follows:

> "Well, we was going along on the bridge, we was going to the East Side and all of a sudden a car passed me and got in front of me and we was heading the same direction for the ramp. And he passed at a good rate of speed, and I made a statement that he was going to get it.
>
> Then before I knew it, then I seen the brake applied, dust flew, and everything happened real fast after that, and the man hit the pole."

No one else had ever attempted the curve at that speed.

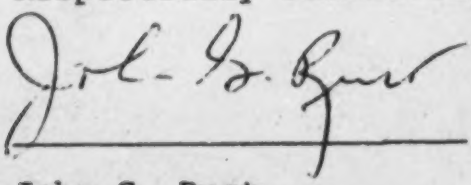
A jury could have understood the Trial Court's instructions as in effect requiring a finding of Respondent having to know an accident would happen.

Imposition of an unconstitutional standard has prejudiced a surviving spouse, their 6 children, and the mother. Also, the right of a surviving spouse and children as Real Parties in Interest to be present should be declared as constitutionally guaranteed, because the question will be coming up in the future.

All parties still litigating in pending cases should be given the benefit of a state's highest Court's decision invalidating a Guest Statute. Discrimination or partiality in application of Court decisions should be prevented by this Court so that our great Constitution will be carried out in practice, and our Court system more greatly respected.

These causes are worthy of this Court's Review, and we respectfully request the same.

Respectfully submitted,



John G. Rust,
Petitioner's Attorney

APPENDIX

COMMENTS OF TRIAL COURT IN RULING TO GIVE CERTAIN SPECIAL REQUESTS FOR INSTRUCTION, AND REJECTING OTHERS.

The Transcript on these points reads as follows at Page 559:

"The Court: I told the jury the matters the Court is considering will take more time than anticipated, and they are recessed until one o'clock with the usual admonition not to discuss the case.

Show the Plaintiff has submitted a number of instructions that the Court will grant, the ones now numbered one through eight, over the objections of the Defendant; and has rejected the ones that are submitted unmarked and submitted to the court reporter for the record, and containing either incorrect statements of law or comments upon the evidence.

"Mr. Jeffery: I have two right there."

"The Court: These are acceptable to the Court. Is there an objection? "

"Mr. Bartlett: Certainly."

"Mr. Rust: Yes, Your Honor."

"The Court: I will accept this" It will be No. 9."

SPECIAL INSTRUCTIONS GIVEN BY COURT TO JURY

BEFORE ARGUMENT

The above are found in the Transcript at Page 563-1, as follows:

"THE COURT: Ladies and gentlemen, for the record, this is what was done while were were recessed. The defendant and Plaintiff have both rested their cases, and the evidence is closed. Before the final arguments that Counsel are about to give to you now, each of the parties have the right to request from the Court written instructions of law to be read to you before the final argument so that you may understand the arguments better. These instructions are in writing, and each written instruction is a correct statement which relates to one subject, and may not be a complete statement of the law.

"What I give you now, the special instructions, and the oral instructions which I will give you after argument, togther constitute the law of the case. Now these special instructions will be with you in the jury room in writing. Because they are with you in writing, they carry no more weight than the general instructions of law which the Court will give you after arguments.

Special Instruction No. 1:

Ladies and Gentlemen of the Jury, you are instructed that

in arriving at a verdict you must no permit yourselves to be influenced in the slightest degree by sympathy, prejudice, or any emotion in favor of or against either party, or their attorneys or witnesses, but you must proceed solely upon the evidence introduced and the instructions of the Court. A lawsuit is not properly a popularity contest, and you are not being called upon to render a verdict based upon whom you like or dislike, approve or disapprove, but rather you are called upon here to make certain legal determinations, and to decide the case solely upon the evidence and facts, and the instructions of law thereon given by the Court.

Number 2, Ladies and Gentlemn of the Jury, the Court instructs you that the drinking of alcoholic beverages does not provide a defense to any person. The law holds any man who is under the influence of alcohol to any extent to knowing that which a sober person under all the circumstances would have known, and requires such a person drinking alcoholic beverages to hold to the same standard of care and performance as the law requires of a sober person under the same circumstances.

Number 2-A. Wanton misconduct is such behavior as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the part doing the act of failing to act must be conscious, from his knowledge of such circumstances and conditions, that his conduct will probably result in injury. Wanton misconduct implies a failure to use any care for the Plaintiff and an indifference to the con sequences, when the probability that

harm would result from such failure is great, and such probability is known, or ought to have been known, to the defendant.

No. 2-B Ladies and Gentlemen of the Jury, the Court charges you that wantonness can never be predicated upon speed alone, nor upon intoxication alone; but when the concomitant facts show an unusually dangerous situation and a consciousness on the part of the driver that his conduct will in common probability result in in jury to another ofwhose dangerous position he is aware, and he drives on without any care whatever, without slackening speed, at such time and place as would be effective to prevent an accident or collision, in utter heedlessness of the other person's jeopardy, speed plus such unusually dangerous surroundings and knowing disregard of another's safety, may amount to wantonness.

No. 3 Ladies and Gentlemen of the Jury, you are instructed, that if under all the instructions of law given by the Court, you find for the Plaintiff, your next duty would be to determine the amount of your verdict, and in the action for wrongful death, which is Action No. 203720, the measure of damages in that action is the pecuniary injury only, the money value of the deceased Neno S. Nenoff to his mother and wife and his children. This is the law. The Jury cannot consider the bereavement or mental suffering of his family, nor can you, in this action for wrongful death, Number 203720, allow anything by way of exemplary damages. The sole question for the Jury as to damages is what actual pecuniary loss the beneficiaries

of the deceased named in the Petition have sustained by his death; and in coming to a conclusion on this matter, the Jury may consider the habits of the deceased whether or not he was an industrious man, his physical condition, his capability of earning money, the manner in which he provided for his beneficiaries, his expectancy of life, and such other circumstances presented by the evidence as will aid you in coming to a correct conclusion.

In determining the amount of damages, if any, in a case like this, with reference to the earning power of the decease, the Jury is instructed that the true basis for recovery for the death of Neno S. Nenoff is what you may find that the decedent would probably have contributed to his family, either for theri support or as an addition to his estate. You may also consider whatever losses, if any, are proved by the evidence, that the beneficiaries would probably have suffered as a result of the loss of any instruction and training which the decedent would have given to them in work and business and other habits which directly affect one's ability to make or hold onto money; and whatever loss has occurred due directly to the denial of his business advice and counsel and judgment, and the loss of any financial assistance, which you find he probably would have given had he lived. The measure of damages for the loss of aaid decedent, so far as future earnings and contributions go to constitute damages is the present value of the contributions which you find that the decedent would probably made to the beneficiaries, ascertained by deducting the cost of his living and expenditures from his net income and no more can be allowed than the present worth of accumulations arisin g from such net income, based upon

the expectancy of life. That is, having ascertained the total sum, its payment must be anticipated, and no more than the present worth thereof can be awarded in damages. The discount should be made only from the time it is found that such contributions would have been actually made had the decedent lived, and not at the end of the decedent's expectancy.

No. 4, If the Jury finds for the Plaintiff, the Jury, in determining the amount of damages to be awarded to Plaintiff, may consider whether the pruchasing power of moeny and the cost of living will change, and also any changes which it finds in the amounts of money which the decedent would probably earn in the future had he lived.

No. 5, The Court instructs you that under the law the children of Neno S. Nenoff had a legal right to be supported by their father, and said decedent was under a legal duty to support them, regardless of any other support or money that might beavailable for the support of said children from any other source. The Court further instructs the Jury that likewise, the Decedent was under a duty to support his wife, and this duty would have contineued into the future unlessshe failed her duties as a wife, and that said duty of support would continue, regardless of whether she inherited money or not. Until the evidence proves the contrary, the law presumes that each man will obey the law. You may also consider the procedure available for enforcement of this duty of support which the law provides, and whether the decedent, had he lived, would have discharged his duties of support.

No. 6 The Court instructs the Jury that in determining the

amount of damages, the Jury is to disregard the possibility of the remarriage of Mrs. Pauline Nenoff.

No. 7 Ladies and Gentlemn of the Jury, you are instructed that to charge the Plaintiff's decedent had full knowledge of a condition, which condition would be obviously and patently dangerous to him, and you must furhter find that he voluntarily and knowingly exposed himself to the hazard created; and you are further instructd that entering an automobile, in and of itself alone, with knowledge that the driver had been drinking, would not in and of itself aloen, constitute assumption of risk by Plaintiff's decedent.

No. 8 Ladies and Gentlemen of the Jury, in Action No. 206839, if you find that the Defendant is guilty of wanton misconduct and that the Plaintiff is entitled to recofer, you will also consider whether or not the Plaintiff is entitled to exemplary damages. Exemplary damages are damages which are awarded against a party for his wrongful act or conduct, and which may serve as an example, to deter others from the commission of similar acts. Such damages are awarded by the Jury, if at all, on the groudns of public policy. The object of the law in permitting an award of exempllary damages, is to punish the wrongdoer in dollars and cents, and to this give a warning to the wrongdoer and others, to prevent the repetition of the wrong, or a similar wrong, to others. The amount of such exemplary damages is left to the sound judgment and discretion of the Jury. In the event you find the Plaintiff is entitled to exemplary damages, you may in your estimate of the amount to be awarded as compensatory damages in Acton No. 206839 take into condideration and include reasonable

attorney fees of counsel employed in the prosecution of the Action. Provided, however, that in no event may you award damages in excess of the amount prayed for in the Petition in Action No. 206839, that is the sum of $25,000.

No. 9. Wanton misconduct is such conduct as connotes perverseness exhibited by deliverate and uncalled for conduct, under such surrounding circumstandes and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditons, that his conduct will in all common probability result in injury. S peeding alone does not constitute willful or wanton misconduct. Driving while intoxicated is not of itself sufficient to constitute an act of wanton or willful misconduct. There must be a consciousness on the part of the driver that his conduct will in all probability result in injury to another.

Therefore, I instruct you that if you find that the defendant, George M. Thompson,was driving a motor vehicle at a speed that was faster than he could safely proceed around the curve on the ramp, but that there was no consciousness on the part of the defendant, George M. Thompson, that his conduct would in all probability result in injury to another, then your verdict must be for the defendant, George, --this has a W. I presume that a misprint. Make that George M. Thompson. I will finsih the sentence - then your verdict must be for the defendant, George M. Tho-mpson, on the question of liabiltiy.

Ladies and Gentlemen, counsel by agreement have asked for andbeen granted two hours of total argu-

ment for each side. We will now proceed with Plaintiff's opening argument.

Thereupon, counsel for the respective parties presented their closing argument to the Court and Jury."

PETITIONERS' REQUESTS TO THE TRIAL COURT TO CORRECT HIS "ERRORS OF OMISSION" ON THE DEFINITION OF WANTON MISCONDUCT BY EMPHASIZING ACTUAL CONSCIOUSNESS OF PROBABILITY OF INJURY, RIGHT TO EXEMPLARY DAMAGES FOR WANTON MISCONDUCT, AND FAILURE TO STATE DECEDENT ENTITLED TO PRESUMPTION OF DUE CARE.

The transcript shows the above at page 591, as follows:

> "Are there any further instructions that you want?
>
> "MR. RUST: Yes, Your Honor. (Thereupon, an off-the-record discussion was had.)"

And the transcript also states, at page 594:

> "MR. RUST: (Aside to Reporter) Let the record show that immediately after the Judge finished his remarks and instructions of law and called counsel to approach the bench, that I then asked the Judge to charge on the following points:
>
> "First of all on the issue of wanton misconduct that when he read his statement and definition in regards to the term of probability, he omitted to use the words, "or ought to have been known", and I asked him then to cover that by reading again Special Instruction 2 on wanton misconduct, which is taken from the Ohio Book of Court Approved Instructions.

"Number two, that I asked the Judge to instruct that if the jury found malice, as the Court defined it or if the jury found the defendant was guilty of wanton misconduct, then in either event that they may award examplary or punitive damages, if they chose to do so.

"Number three, I asked him to charge that the law presumes that Neno Nenoff acted with ordinary care to protect and preserve his life. (End of aside to reporter).

"At 4:40 p.m. the jury submitted a question asking, "If we find for the Plaintiff in one case, do we have to find for the Plaintiff in the other?"

"The question was simply answered, "Yes." "